No. 91-1809

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,

Petitioners

v.

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and WENNER FORD TRACTOR, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 11, 1992

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QUESTIONS PRESENTED

1. Does the Seventh Amendment allow federal appellate review of a district court's denial of a motion to set aside a jury's award of punitive damages?

2. "In performing the limited function of a federal appellate court", operating under "the strictures of the Seventh Amendment", did a panel of the Third Circuit improperly substitute its own judgment for the jury's and interfere with the jury's proper role in violation of the Seventh Amendment, and did the panel fail to apply "proper deference to the district court", when the panel reversed the district court's denial of motions in "a classic jury case" to set aside the jury's factual findings that (a) *two* respondents defrauded petitioners; (b) the facts constituted "outrageous conduct" warranting punitive damages; (c) respondents' conspiracy substantially harmed competition in relevant, "well-defined" product and geographic *"submarkets"* in violation of antitrust laws; and (d) petitioners were entitled to compensatory damages in the amount, and in accordance with petitioners' "understanding", as determined by the jury?

3. Where the opinion filed by the Third Circuit's panel included flagrant and material errors in stating what the jury found, what the district court decided, and its own conclusions, tainting a confused opinion and exposing fatal flaws in appellate decision-making, some of which errors the panel corrected by subsequent amendments, and where the panel requested and relied upon respondents' post-trial motions and memoranda, but declined to receive petitioners' briefs in opposition, should not this Court exercise its power of supervision, reverse the panel's decision, and affirm the district court's decision in all respects, in the interest of justice to correct plain errors and fundamental unfairness in the panel's judicial proceeding?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the parties to the proceeding below were *Petitioners* Tunis Brothers Company, Inc., Richard N. de la Rigaudiere and David C. Smith; and *Respondents* Ford Motor Company, Ford Motor Credit Company, Wenner Ford Tractor, Inc., John S. Wenner, John Watson, Douglas N. Crawford, Eugene W. Fraher, E. S. Hasel, Hugh Nickel, Kenneth E. Harris, and C. W. Wenzel.

The District Court dismissed all the individual defendants named herein as respondents except John S. Wenner, in whose favor the jury returned a verdict. Petitioners believe that none of the individual respondents has any interest in the outcome of this Petition except for John S. Wenner in his capacity as an officer, director and stockholder of respondent Wenner Ford Tractor, Inc. The only respondents with a direct interest in the outcome of this Petition are the three corporate respondents.

Pursuant to Rule 29.1, petitioner Tunis Brothers Company, Inc. has no parent company and no subsidiary company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Tunis Brothers Company, Inc., Richard N. de la Rigaudiere, and David C. Smith respectfully pray that a writ of certiorari issue to review the Amended Judgment and the Opinion of the United States Court of Appeals for the Third Circuit, which Opinion was filed December 27, 1991 and amended on January 10 and 24, 1992. The Amended Judgment was entered January 10, 1992. An Order denying a petition for rehearing was entered on February 11, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (*"Tunis Brothers III"*), which was filed December 27, 1991 and is the subject of this Petition, is reprinted in the Appendix hereto at A-1 to A-64.[1] The Third Circuit's amendments to its Opinion are reprinted in the Appendix at A-65 to A-71. The Opinion and amendments thereto have not been officially reported. The Opinion as finally amended in certain very significant respects is reported at 952 F. 2d 715 (3d Cir. 1991). The unreported order of the Third Circuit filed February 11, 1992 denying a petition for rehearing is reprinted at A-150 to A-152.

The unreported Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, filed December 3, 1990, is reprinted at A-73 to A-92, and the District Court's Order, entered September 27, 1990, denying respondents' post-trial motions, is reprinted at A-93.

In *Tunis Brothers Company, Inc. v. Ford Motor Company,* 587 F. Supp. 267 (E. D. Pa. 1984) the District Court granted summary judgment on the antitrust counts in favor of defendants (the respondents herein) and dismissed the common law counts. Twice the Third Circuit reversed the summary judgment, reinstated the common law counts, and remanded the case to the District Court for trial on all counts. *Tunis Brothers Company, Inc. v. Ford Motor Company,* 763 F. 2d 1482 (3d Cir. 1985)(*"Tunis Brothers I"*), judgment vacated and remanded to the Third Circuit "for further consideration in light of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U. S. 574 (1986)", 475 U.S. 1105 (1986); *Tunis Brothers Company, Inc. v. Ford Motor Company,* 823 F. 2d 49 (3d Cir. 1987)(*"Tunis Brothers II"*), *cert. denied,* 484 U. S. 1060 (1988). The Third Circuit's opinion in *Tunis Brothers I*

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1. References to the Appendix hereto, which is separately bound, are cited herein as "A- ".

is reprinted in the Appendix at A-96 to A-139, and its opinion in *Tunis Brothers II* is reprinted at A-141 to A-148.

JURISDICTION

The Amended Judgment of the Third Circuit (A-157 to A-158) which petitioners seek to have the Court review was entered on January 10, 1992. A timely petition for rehearing was denied on February 11, 1992 (A-150 to A-152). This Court has jurisdiction pursuant to 28 U. S. C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Seventh Amendment* to the Constitution of the United States of America provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Petitioners brought this antitrust action pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) by reason of respondents' alleged violations of Section 1 of the Sherman Act (15 U.S.C. §1) which provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent,

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

In 1982 petitioners commenced this federal antitrust action (with fraud and other common law claims) against respondents Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), Wenner Ford Tractor, Inc. ("Wenner Ford") and certain individuals. This action was brought in the United States District Court for the Eastern District of Pennsylvania which has jurisdiction under Section 4 of the Clayton Act, 15 U.S.C. §15.

This is the third time in seven years that a decision of the United States Court of Appeals for the Third Circuit in this *Tunis Brothers* case has come before this Court on a petition for a writ of certiorari. Twice before the petitioners were the defendants below seeking review of the Third Circuit's reversal of summary judgment entered against plaintiffs by the District Court. Now the petitioners are the plaintiffs below seeking review of a post-trial decision of a different panel of the Third Circuit disagreeing with the jury's verdicts on liability and damages in favor of plaintiffs in what the District Court called "a classic jury case" (App. 3525)[2] and reversing the District Court's denial of judgment n.o.v. on most issues, all in a confused opinion (A-1 to A-92) fatally tainted by certain flagrant and material errors, reflecting adversely on the opinion's validity, which the Panel subsequently tried to correct by amendment (A-65 to A-70) only after counsel brought these errors to the Panel's attention (A-159).

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2. References to "App." are to the Appendix in the court below.

Tunis Brothers Company, Inc. ("Tunis Brothers") was a profitable tractor dealer in Kennett Square, Pennsylvania, the "Mushroom Capital of the World", under a franchise agreement with Ford for 22 years, until Ford terminated its franchise in April 1981 after Mr. and Mrs. Richard M. Tunis, the owners of Tunis Brothers, sold the business to their nephew and employee, Richard N. de la Rigaudiere ("de la Rigaudiere") and to their friend, David C. Smith ("Smith").

Petitioners alleged that Ford and Ford Credit conspired with Wenner Ford and the individual defendants to terminate the authorized Ford tractor dealership of Tunis Brothers and to deny and refuse to give a new Ford tractor franchise to Tunis Brothers and its new owners in Kennett Square to eliminate or substantially decrease competition with Wenner Ford, a dealer development company which Ford had helped recently to establish nearby and in which Ford had a very substantial financial interest. Petitioners alleged that this was all in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act. Petitioners further alleged that respondents employed fraud and trickery against them in doing all this and used dirty business tricks in defrauding each of them.

Petitioners' profitable tractor business was thereby destroyed. Petitioners claimed injuries to their business and property in the amount of $7,724,357. They sought treble damages from respondents under Section 1 of the Sherman Act and Section 4 of the Clayton Act. Petitioners also sought punitive damages, as well as compensatory damages, under their state common law fraud count.

A jury trial in this case began on November 15, 1988 and ended on February 1, 1989 with the Honorable Louis C. Bechtle, now Chief Judge of the District Court, presiding. The issues of liability and damages were bifurcated at trial.

On December 16, 1988 the jury answered eight written interrogatories on liability (A-160 to A-163). The

jury found that Ford and Ford Credit had conspired with Wenner Ford "to terminate the authorized Ford tractor dealership of plaintiff Tunis Brothers Company, Inc. and to reject the application of plaintiffs Richard N. de la Rigaudiere and David C. Smith for a new Ford tractor franchise for Tunis Brothers in Kennett Square"; that the relevant product market in this case was "Ford tractors only"; that the relevant geographic market in this case was "the 'Kennett Square area' as defined by plaintiffs in their Exhibit P-302"; that "the conspiratorial conduct of the defendants substantially harm[ed] competition in the 'relevant market' "; that "the harm to competition in the relevant market [was] greater than any beneficial effects on competition in the relevant market"; that defendants' conduct caused injury to all three plaintiffs; that Ford "secure[d] through fraud the unconditional resignation of Richard M. Tunis contrary to his intention" [thus facilitating the termination of the Ford tractor franchise of Tunis Brothers]; and that both Ford Motor Company and Ford Motor Credit Company "defrauded plaintiffs in connection with their application for a new Ford franchise in Kennett Square and for approval by Ford Motor Credit Company".

Following trial on damages, on February 1, 1989 the jury returned a verdict of $227,605.50 against Ford, Ford Credit and Wenner Ford on the antitrust claim. The District Court trebled that to $682,816.50 and entered judgment in that amount against them "jointly and severally". On the state fraud claim, the jury returned a verdict of $227,605.50 apportioned $159,323.85 against Ford and $67,281.65 against Ford Credit. Further on the state fraud claim, the jury answered an interrogatory on punitive damages as follows: "In what sum, if any, is Tunis Brothers Company, Inc. entitled to recover punitive damages from the below named defendants: Ford Motor Company – $2,800,000; Ford Motor Credit Company – $1,200,000" (A-165).

In determining compensatory damages, the jury found, in answering interrogatories (A-164 to A-165), that when Tunis Brothers applied for a Ford tractor dealer franchise it was "the understanding of plaintiffs that the tractor dealer franchise would be awarded at the Kennett Square location of Tunis Brothers Company, Inc. *indefinitely*", and that Tunis Brothers "suffered damages from loss of profits caused by the failure of . . . Ford Motor Company to grant Tunis Brothers . . . a Ford tractor dealer franchise at its Kennett Square property *for an indefinite period commencing April, 1981, but not to exceed ten years*" in the sum of $227,605.50 (A-164 to A-165)(Emphasis added).

On September 27, 1990, Chief Judge Bechtle entered an Order denying respondents' post-trial motions for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur (A-93). On December 3, 1990 he filed his supporting "Memorandum and Order" (A-73 to A-92).

Respondents appealed from the District Court's Order denying their post-trial motions. A new Panel of the Third Circuit heard argument on June 27, 1991. On December 27, 1991 the Panel filed its Opinion (A-1 to A-64) in which it reviewed and weighed the evidence, disagreed with the jury and the trial judge on all issues except one, and held:

1. "[T]he evidence did not support the jury's finding of a Ford tractor only product market" and "[b]ecause the testimony does not indicate that the relevant product market was limited only to Ford tractors, we conclude that the relevant product market consisted of Ford and other comparable tractors" (A-23). Further, "plaintiffs' evidence did not establish that the relevant geographic market was limited to the Kennett Square area", as the jury found (A-27). Therefore, "we conclude that plaintiffs have failed to show that Ford Motor exercised market power . . . [and] caused an unreasonable restraint of trade that implicated an injury to competition" (A-28). The Panel therefore reversed and directed the

District Court "to grant judgment n.o.v. in favor of all the defendants on the antitrust claim" (A-30).

2. "We will affirm the order of the district court denying Ford Motor and *Wenner Ford's* motion for judgment n.o.v. on the fraud claim" (A-63). "[W]e conclude that the trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor *and Wenner Ford*" (A-38). "This evidence clearly supports the jury's determination that Ford Motor *and Wenner Ford* committed a fraud against the plaintiffs" (A-42). [Emphasis added.][3]

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3. This Panel of the Third Circuit was clearly correct in affirming the jury's finding that *Ford Motor Company* defrauded petitioners and the District Court's order denying Ford's motion for judgment n.o.v. on petitioners' fraud claim.

Furthermore, petitioners believe that the jury *should have* returned a verdict against *Wenner Ford* on fraud liability and for punitive damages. But, it did not. And *Wenner Ford* made no motion for judgment n.o.v. on the fraud claim and the District Court did not, of course, deny a motion that *Wenner Ford* did not make.

In addition to the errors quoted above about Wenner Ford's alleged fraud liability, the Panel erroneously stated in its Opinion at A-63 and A-64:

> "We will therefore remand this action for a new trial on compensatory damages against Ford Motor *and Wenner Ford* on the fraud count." [Emphasis added.]

Though the Panel tried to correct these flagrant and material errors by amendment (A-65 to A-70) after counsel brought these errors to the Panel's attention (A-159), they cannot be dismissed as merely clerical or typographical errors. These errors taint the entire Opinion and raise very serious questions about the validity of the Opinion and its conclusions, about whether or not the Panel had sufficient comprehension of all the facts and issues here to justify the conclusions expressed in its Opinion.

Another error in the Court's Opinion which the Panel failed to correct is its statement at A-3 that Tunis Brothers obtained a jury verdict of "*$4 million in punitive damages* against the defendants, Ford Motor Company, Ford Motor Credit *and Wenner Ford Tractor, Inc.*" The fact is that the jury did *not* award any punitive damages against Wenner Ford.

The inevitable questions are: What other misstatements or

3. Though the Panel properly devoted some 12 pages of its Opinion (A-31 to A-42) reviewing relevant evidence and applicable law in support of its correct conclusion that "the trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor" (A-38), it took the Panel only 35 lines (A-42 to A-43) to conclude erroneously that "A different result is required with respect to the fraud verdict against Ford Credit, because as a matter of law, the plaintiffs have not established that Ford Credit perpetrated a fraud on the plaintiffs" (A-42). "Accordingly, because there is no evidence to suggest that Ford Credit committed any fraud against the plaintiffs, we will reverse the judgment against Ford Credit on the fraud count, remanding this issue to the district court for judgment to be entered in favor of Ford Credit" (A-43). Neither the evidence nor the law supports that conclusion.

4. The Panel reversed and "vacate[d] the award of punitive damages in its entirety" (A-63) because, in its opinion, the evidence did not constitute "the requisite outrageous conduct for punitive damages" (A-58 to A-63) notwithstanding the jury's finding to the contrary following very detailed and accurate instructions by the trial judge on punitive damages, the need for outrageous conduct and its meaning, and notwithstanding the District Court's post-trial opinion "that the jury's finding of outrageous conduct was sufficiently supported by the evidence" (A-92).

5. Notwithstanding the jury's finding (A-164 to A-165) that, when Tunis Brothers applied for a Ford tractor dealer franchise it was "the understanding of plaintiffs that the tractor dealer franchise would be

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omissions of fact or evidence, what other errors in fact or conclusions of law were made or missed by the Panel in its erratic and flawed Opinion?

Can the Amended Opinion of the Third Circuit's Panel, as laundered, cosmeticized and reported in 952 F. 2d 715 (3d Cir. 1991), cover up these revealing flaws in appellate decision-making?

awarded at the Kennett Square location of Tunis Brothers Company, Inc. *indefinitely*", and that Tunis Brothers "suffered damages from loss of profits caused by the failure of . . . Ford Motor Company to grant Tunis Brothers . . . a Ford tractor dealer franchise at its Kennett Square property *for an indefinite period* commencing April, 1981, but *not to exceed ten years*" in the sum of $227,605.50 (A-164 to A-165) – and notwithstanding the District Court's post-trial decision that "*This was a quintessential question of fact to be determined by the jury*" (A-91) – the Panel of the Third Circuit held that "the record does not sufficiently substantiate a ten year period of time. Thus, upon remand, the compensatory damages evidence must be limited to that two to three year period of time dating from the 1981 franchise termination" (A-47).

6. The Panel remanded "this action for a new trial on compensatory damages against Ford Motor and Wenner Ford [*sic*] on the fraud count" (A-63 to A-64). "The evidence of lost *gross* profits was too speculative to support an award of damages. Therefore, we will grant a new trial on compensatory damages in which the plaintiffs shall be entitled to produce evidence pertaining to net lost profits and which shall account for actual results in the market place rather than those based purely on outdated and speculative predictions" (A-57). The Panel thus reversed the District Court which held that "The determination of damages was a question for the jury. The court does not find that the jury's award of compensatory damages was so excessive or speculative as to warrant reversal" (A-91).[4]

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4. The District Court further stated: "[A]s the Supreme Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123-24 (1969): '[D]amage issues in [antitrust] cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts . . .' Accordingly, courts have permitted evidence of lost gross profits where incremental operating expenses in connection with increased sales would have been nominal. [Citing cases from 5th, 6th, 7th and 9th circuits and district court

* * *

On October 23, 1991 (two months before the Third Circuit's Panel filed its Opinion in this *Tunis Brothers III* case on December 27, 1991), the Clerk of the Third Circuit wrote a letter (A-167) to the attorneys for Ford, Ford Credit and Wenner Ford stating:

> This will confirm our telephone call to each of you today. The Court wishes you to supply it with four (4) copies of all your motions (with supporting legal memoranda) for judgment n.o.v. or a new trial. These should be received in the Clerk's office by Monday, October 28, 1991.

Upon receiving a copy of that letter, counsel for petitioners Tunis Brothers, *et al.* delivered a letter to the Clerk (A-168) on October 25, 1991 referring to the Clerk's letter of October 23, 1991 and asking:

> Would the Court want me to supply copies of the legal memoranda or briefs in opposition to those motions filed on behalf of the plaintiffs with the District Court? If so, the Court would then have before it the same legal memoranda, pro and con, which Judge Bechtle had before him and which he considered when he denied those motions. Please let me know.

Notwithstanding two subsequent telephone inquiries made of the Clerk's Office by petitioners' counsel concerning the Court's response, no response was ever

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cases in the 3rd circuit.]

"Plaintiffs' evidence of lost gross profits was submitted to the jury, along with defendants' evidence and arguments that net profits was the proper formula. The jury accepted neither parties' calculation as to compensatory damages but, instead, reached a compromise verdict. Given the conflicting damage evidence at trial, the court does not believe that the evidence presented to the jury was incorrect as a matter of law. The jury's verdict on compensatory damages under the antitrust claim will not be set aside" (A-89 to A-90).

given by or on behalf of the Court to petitioners' counsel. This lack of response clearly indicated that the Court was not interested in how and what petitioners had responded to respondents' post-trial motions in the District Court. As the Panel knew from petitioners' principal Brief on appeal (p. 40), petitioners had filed with the District Court on June 30, 1989 a 180-page brief entitled "*Plaintiffs' Brief in Opposition to Defendants' Post-Trial Motions*". The Panel wanted to see only what *defendants* had argued in the District Court in support of their post-trial motions. The Panel did not want to see *plaintiffs'* briefs and arguments in response.

Was this fair? Was this the way a fair and impartial court should proceed? Was this the accepted and usual course of judicial proceedings? Does this call for an exercise of this Court's power of supervision?

On October 28, 1991, counsel for Ford Motor Company, *et al.* filed with the Third Circuit voluminous post-trial memoranda and briefs together with two volumes of a supporting Appendix.

With respect to the Panel's holding that "the record does not sufficiently substantiate a ten year period of time" for petitioners to stay in Kennett Square (A-46 to A-47), the Panel obviously relied upon what respondents had briefed extensively and erroneously in the memorandum they had submitted to the District Court, because they had not briefed this issue on appeal. If the Panel had requested or received "*Plaintiffs' Brief in Opposition to Defendants' Post-Trial Motions*" filed with the District Court, the Panel could have read pages 134-149 thereof analyzing the testimony at trial showing that, after petitioners met with Ford's agents on March 3, 1981, it was petitioners/plaintiffs' understanding that they could stay in Kennett Square "indefinitely" instead of only two or three years as they thought previously. The jury so found. The District Court so held stating: "This was a quintessential question of fact to be determined by the jury" (A-91).

REASONS FOR GRANTING THE WRIT

I. This case enables the Court to review and define further "the limited function of a federal appellate court" operating "under the strictures of the Seventh Amendment" and "proper deference to the district court" as in *Browning-Ferris*, but where a federal appellate court reversed the district court's denial of motions to set aside a jury's findings.

This Seventh Amendment case presents the Court with the rare and much needed opportunity to define further and implement "the limited function of a federal appellate court" operating "under the strictures of the Seventh Amendment" and "applying proper deference to the District Court" specified by this Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 277-280 (1989). The Third Circuit did not heed this Court's cautions. Its recent decision in *Tunis Brothers III* is in conflict with *Browning-Ferris*.

Like *Browning-Ferris*, our present case involves federal antitrust and state tort counts on which the jury awarded compensatory damages. In both cases the jury also awarded substantial punitive damages on the state claims and the District Court denied motions for judgment notwithstanding the verdict, a new trial, or remittitur.

In *Browning-Ferris* the United States Court of Appeals for the Second Circuit affirmed the judgment both as to liability and as to damages. This Court affirmed.

To the contrary, in our *Tunis Brothers* case now before this Court on a petition for a writ of certiorari, the United States Court of Appeals for the Third Circuit reversed the District Court's denial of judgment n.o.v. on respondents' antitrust liability, on the state fraud liability of Ford Motor Credit Company (affirming the state fraud liability of Ford Motor Company) and on punitive damages which the Third Circuit "vacate[d] . . . in its entirety". In addition, the Third Circuit

ordered a new trial on compensatory damages against Ford Motor Company. (A-63 to A-64).

In *Browning-Ferris* this Court stated in relevant part (with emphasis added) at 492 U. S. 277-280:

> Petitioners also ask us to hold that this award of punitive damages is excessive as a matter of federal common law. . . . *It is not our role to review directly* the award for excessiveness, *or to substitute our judgment for that of the jury.* Rather, *our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion* in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. *Applying proper deference to the District Court,* the award of punitive damages should stand.
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> Review of the District Court's order involves questions of both state and federal law. In a diversity action, or in any other lawsuit where state law provides the basis of decision, *the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.* Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals. See *Donovan v. Penn Shipping Co.*, 429 U. S. 648, 649-650 (1977); see also 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice, ¶59.04[l] (2d ed. 1987).
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> In reviewing an award of punitive damages, *the role of the District Court* is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. *The Court of Appeals should then review the District Court's*

determination under an abuse-of-discretion standard.[25] [See *infra* for the Court's note 25]. Although petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of *proportionality* between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, *these are matters of state*, and not federal, *common law*. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues. For obvious reasons we decline that invitation.

In performing the limited function of a federal appellate court, we perceive no federal common-law standard, or compelling federal policy, which convinces us that we should not *continue to accord considerable deference to a district court's decision not to order a new trial.*[26] [Note 26: This is particularly true because *the federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.*] . . . [W]e are convinced that [the Court of Appeals'] conclusion that there was no abuse of discretion by the District Court is consistent with federal standards, in light of the broad range of factors Vermont law permits juries to consider in awarding punitive damages.

* * *

In addition to the other reasons expressed or implied in this Petition for granting the writ of certiorari in this *Tunis Brothers* case, Note 25 to this Court's Opinion in *Browning-Ferris* makes clear that this case is *cert-worthy*. This Court stated in Note 25:

> We have never held expressly that the *Seventh Amendment* allows appellate review of a district court's denial of a motion to set aside an award as excessive. ***Although we granted certiorari in two cases in order to consider the issue***, in both instances we found it unnecessary to reach the question when we decided the case. See *Neese v. Southern R. Co.*, 350 U. S. 77 (1955)(even assuming appellate review power under the *Seventh Amendment*, Court was not justified in reversing denial of new trial on the particular facts of the case); *Grunenthal v. Long Island R. Co.*, 393 U. S. 156, 158 (1968)(same). In light of the result we reach today, we follow the same course here. 492 U. S. at 279.

* * *

The Third Circuit's rulings on various issues in the *Tunis Brothers* case now before this Court were summarized at pages 7-10 *supra*, and will be discussed more fully *infra* with respect to punitive damages and other issues. However, even a quick reading of the Third Circuit's opinion (A-1 to A-64) will disclose that the Panel of the Third Circuit which heard and decided *Tunis Brothers III* and which filed this erratic opinion paid no attention to the "strictures of the Seventh Amendment" or to "the limited function of a federal appellate court" when it reversed the District Court's denial of judgment n.o.v. on almost everything, showing no deference to the District Court whatever, and substituting its own judgment for that of the jury on facts and factual conclusions. Nowhere did the Panel state that the District Court abused its discretion. In essence, the Panel simply ignored the experienced trial judge (who presided over many weeks of trial testimony and other evidence) and his well-reasoned and persuasive Memorandum opinion (A-73 to A-92) supporting his denial of

respondents' post-trial motions for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur.

If this opinion of the Third Circuit is permitted to stand – with a substitution of Panel judgment for jury judgment on so many factual issues – *there is no point to trial by jury in the Third Circuit or elsewhere*. That will be just a waste of time. This opinion demonstrates contempt for jury verdicts and disregard for the judgment and discretion of the District Court. Unlike this Court in *Browning-Ferris*, the Panel in this *Tunis Brothers* case did *not* remember that "the federal courts operate under the strictures of the Seventh Amendment" and the Panel was obviously not "reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury".

The Panel gave initial lip service to applicable standards of appellate review and then ignored them completely. If the *Seventh Amendment* can ever be violated by judicial review, the Panel violated it in this case. Because this Panel of the Third Circuit has gone so far in violating applicable standards and appellate guidelines, its Opinion now presents a bona fide, fundamental issue of whether or not this Panel has violated the *Seventh Amendment* of the Constitution of the United States. A writ of certiorari should be granted for this reason alone. How far can a federal appellate court go without violating the Seventh Amendment? Perhaps the Third Circuit wants to know.

A judgment n.o.v. "raises the constitutional question of possible infringement of the Seventh Amendment, which forbids re-examination of any fact tried by a jury, 'in any Court of the United States other than according to the rules of common law'." 5A J. Moore & J. Lucas, Moore's Federal Practice ¶50.07[1] (2d ed. 1992) "[T]he constitutionality of the judgment n.o.v. is dependent on adherence to the standards limiting the power of the courts to invade the province of the jury. The

standards for granting a motion for judgment n.o.v., on which the constitutionality of such action depends, are the same as those governing the direction of a verdict." *Id.* at ¶50.07[1] and [2].

Forty-nine years ago, Justice Black wrote a memorable dissenting opinion in *Galloway v. United States*, 319 U. S. 372, 396-411 (1943), concurred in by Justices Douglas and Murphy, on the importance of the Seventh Amendment and its "judicial erosion". Professor Moore has described it as "an eloquent defense of the jury". 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice ¶38.08[5.-1] (2d ed. 1991). Justice Black wrote in part:

> The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty. [Note: [T]his Court has on occasion warmly praised this mode of trial: "The right of jury trial in civil cases at common law is *a basic and fundamental feature of our system of federal jurisprudence* which is protected by the Seventh Amendment. *A right so fundamental and sacred to the citizen*, whether guaranteed by the Constitution or provided by statute, *should be jealously guarded by the courts*." *Jacob v. New York*, 315 U. S. 752 (1942).] * * *
>
> *Today's decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.* (319 U. S. at 397) * * * Today the Court comes dangerously close to weighing the credibility of a witness and rejecting his testimony because the majority do not believe it.

The story thus briefly told depicts the constriction of a constitutional civil right and should not be continued. (319 U. S. at 405) * * *

"Trial by jury is a fundamental guaranty of the rights of the people, and *judges should not search the evidence with meticulous care to deprive litigants of jury trials.*"

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. *Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain.* * * * *So few of these cases come to this Court* that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases *a judge should*, in obedience to the command of the Seventh Amendment, *not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert* to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances. (319 U. S. at 407) [Emphasis added.]

* * *

Three years ago, in *Browning-Ferris* this Court reaffirmed the vitality of the Seventh Amendment and the need for judicial restraint when it emphasized "the

limited function of a federal appellate court" operating "under the strictures of the Seventh Amendment" and "applying proper deference to the District Court".[5] The Court seemed to have Justice Black's admonitions in mind. Because the District Court, the Court of Appeals and this Court all affirmed, in effect, the jury's verdict in *Browning-Ferris*, there was no need there for this Court to say more than it did about those judicial restrictions.

This *Tunis Brothers* case, now before the Court on our petition for a writ of certiorari, is different. Though the District Court respected the jury's verdict in this "classic jury case", the Court of Appeals did *not*. This Court now has the opportunity, if it grants a writ of certiorari, to review the Third Circuit's negative holdings and reversals in this case in light of the "strictures of the Seventh Amendment" and "the limited function of a federal appellate court". A decision and Opinion by this Court in *Tunis Brothers* can then define further "the limited function of a federal appellate court" and tell all federal appellate courts how much they must defer to a district court's denial of post-trial motions to upset a jury's verdict and how far they can go in reviewing jury verdicts without violating the Seventh Amendment.

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5. In *Anderson v. Bessemer City*, 470 U. S. 564, 574-5 (1985), a Rule 52(a) case, the Court stated: "The rationale for *deference* to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' "

II. The Third Circuit improperly substituted its own judgment for the jury's and failed to apply proper deference to the District Court in reversing its denial of motions to set aside the jury's findings that both Ford and Ford Credit defrauded petitioners and that the facts constituted "outrageous conduct" warranting punitive damages against both.

After a trial of many weeks, during which a great deal of testimony and other evidence was produced, the jury in this case found that Ford Motor Company and Ford Motor Credit Company had defrauded the petitioners; that Tunis Brothers Company, Inc. was entitled to compensatory damages in the amount of $227,605.50, apportioned $159,323.85 against Ford and $67,281.65 against Ford Credit; and that Tunis Brothers was also entitled to recover punitive damages from them in the amount of $4,000,000, apportioned $2,800,000 against Ford Motor Company and $1,200,000 against Ford Motor Credit Company.

In denying respondents' post-trial motions for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur (A-73 to A-93), the District Court sustained the jury's verdict of fraud liability against both Ford and Ford Credit. Further, the District Court ruled that the compensatory damages awarded on petitioners' fraud claim was sufficiently supported by the evidence, was not incorrect under Pennsylvania law and was not "so excessive or speculative as to warrant reversal".

Finally, the District Court stated: "[W]hether defendants' fraud was so outrageous as to warrant punitive damages was a question for the jury . . . The court believes that the jury's finding of outrageous conduct was sufficiently supported by the evidence" (A-91 to A-92).

On appeal, a Panel of the United States Court of Appeals for the Third Circuit affirmed the fraud liability of Ford Motor Company (A-31 to A-42; A-63), but

reversed the District Court's denial of judgment n.o.v. against Ford Credit (A-42 to A-43; A-63).

The Third Circuit "conclude[d] that the *trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor*" (A-38) and that the *"evidence clearly supports the jury's determination that Ford Motor . . . committed a fraud against the plaintiffs"* (A-42).[6]

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6. Very briefly, these are the facts supporting the jury's finding that Ford Motor Company *and Ford Motor Credit Company* defrauded petitioners Tunis Brothers Company, Inc., Richard N. de la Rigaudiere and David C. Smith.

In 1980 de la Rigaudiere and Smith informed Ford that they were negotiating with Mr. and Mrs. Tunis to purchase Tunis Brothers, a profitable Ford tractor dealer in Kennett Square, Pennsylvania for 22 years, and that they wanted to retain the Ford franchise there. They then learned that Ford wanted to give the Kennett Square territory to nearby Wenner Ford Tractor, Inc., in which Ford had a very large financial interest, after Mr. Tunis retired or died. However, Eugene W. Fraher, then Ford's Northeastern District Manager (and, unknown to petitioners, also the Senior Vice President and a director of Wenner Ford) told them that they could have the Ford franchise in Kennett Square for two or three years if they would then move Tunis Brothers to Cochranville some miles away.

After Fraher received a letter from petitioners in January 1981 informing him that petitioners would conclude soon their purchase of Tunis Brothers, he sent two Ford representatives, including Hugh Nickel, to meet with petitioners and Mr. and Mrs. Tunis on March 3, 1981 at Tunis Brothers' place of business in Kennett Square. Nickel told them that, before Ford could act upon petitioners' new application to operate Tunis Brothers as a Ford dealership *in Kennett Square,* it was first necessary for Mr. Tunis to sign an *unconditional letter of resignation and termination notice* on behalf of Tunis Brothers as a Ford dealer and to mail it to Nickel at Ford Motor Company immediately after settlement.

Nickel emphasized that this resignation and termination letter would *not* be acted upon or made effective *until* the application of petitioners, the new owners of Tunis Brothers, for a Ford franchise in Kennett Square was *approved* which, Nickel assured and reassured them, *would be approved.* In the meantime, Nickel stated, this resignation and termination letter would be "kept in a drawer". Nickel talked only about Kennett Square. Cochranville was not even mentioned.

Nickel gave petitioners blank application forms he asked them to sign for *Ford Motor Company* (for a Ford franchise in Kennett Square) and for *Ford Motor Credit Company* (for credit), which they did. Nickel stated that he would have the forms typed up in his office with the information petitioners gave him, and would then return the typed applications to them for their review before submitting them to Ford and Ford Credit. Nickel told petitioners that Ford and Ford Credit would approve these applications. Petitioners never saw these papers again before Nickel submitted them, notwithstanding his promise.

Subsequently, after their applications had been rejected by Ford and Ford Credit, petitioners discovered that Nickel had, in completing the applications signed by them in blank, supplied false financial information about them, stating that they were only investing $2,500 each in Tunis Brothers whereas, in fact and as they had informed Nickel at their meeting, they were each investing $25,000.

Relying upon Nickel's assurances, petitioners and Mr. and Mrs. Tunis closed the purchase and sale of Tunis Brothers on March 16, 1981 and mailed the *unconditional* resignation and termination notice to Nickel. Upon receiving this, Nickel and Fraher requested Ford to "accept dealer resignation" of Tunis Brothers *"immediately"*. At the same time, Nickel sent petitioners' applications, with false investment information he had inserted, to Howard W. Stoneback, Jr., Ford Credit's branch manager. When Stoneback telephoned Nickel to inquire about the very small investment reflected by the credit application, Nickel confirmed this and told Stoneback that Ford's tractor division did not want petitioners approved. Stoneback then immediately telephoned Nickel's superior at Ford to say that he was *strongly* recommending to Stoneback's superior at Ford Credit that it reject petitioners' credit application. Stoneback knew that Ford Credit's rejection of credit would trigger a denial by Ford Motor Company of a tractor franchise for Tunis Brothers under its new ownership. The very next day, April 2, 1981, Ford mailed Tunis Brothers a letter "accepting" Tunis Brothers' "termination" of its Ford tractor franchise "in accordance with your letter dated March 17, 1981".

Despite the assurances of approval Nickel gave petitioners at their meeting on March 3, 1981, Nickel submitted to Ford a very *negative* written report on that meeting and on petitioners with negative recommendations concerning their application. Nickel recommended that Tunis Brothers' franchise should be terminated especially if Ford Credit refused a line of credit (App. 4103).

Though the Third Circuit properly devoted 12 pages of its Opinion (A-31 to A-42) reviewing relevant evidence and applicable law in support of its correct conclusion about the fraud liability of Ford Motor Company, it took the Third Circuit only 35 lines (A-42 to A-43) to conclude *erroneously* that "A different result is required with respect to the fraud verdict against Ford Credit,

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NOTES *(Continued)*

Stoneback testified (App. 1831), with respect to Ford Credit's practice and procedure in securing applications to Ford Credit from prospective Ford tractor dealers, that "What really happens is that the Ford Tractor people [like Nickel] take the applications from the dealer and they are responsible to submit those applications to Ford Credit for our review." This made Nickel *the authorized agent of Ford Motor Credit Company* (even though he was a paid employee of Ford) with actual authority from Ford Credit to secure petitioners' credit application and to submit it to Ford Credit. The credit application forms were supplied by Ford Credit.

Nickel's misrepresentations to petitioners that their credit application, which they signed in blank, would accurately state the financial information they gave Nickel, would be returned to them for review before being submitted to Ford Credit, and that Ford Credit would approve their application for credit, were therefore the misrepresentations of Ford Motor Credit Company.

It is the law of Pennsylvania that "a principal is liable to innocent third parties for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances of his agent committed in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them." *Aiello v. Ed Saxe Real Estate, Inc.,* 508 Pa. 553, 499 A. 2d 282, 287 (1985).

"Whether an agency relationship exists is *a question of fact for the jury.*" *Bolus v. United Penn Bank,* 363 Pa. Super. 247, 259, 525 A. 2d 1215, 1221 (1987), *app. denied,* 518 Pa. 627 (1988). " 'The fact of agency and the scope of the power of an agent are questions for the court, where the authority is created by an instrument in writing; *but* where such authority is to be implied from the conduct of the parties, or where the agency is to be established by witnesses, *the fact and scope of the agency are for the jury.*' *Waldron v. Aetna Casualty & Surety Co.,* 141 F. 2d 230, 234 (3d Cir. 1944), quoting *Singer Manufacturing Co. v. Christian,* 211 Pa. 534, 540, 60 A. 1087, 1088." *Browne v. Maxfield,* 663 F. Supp. 1193, 1198 (E. D. Pa. 1987).

because as a matter of law, the plaintiffs have not established that Ford Credit perpetrated a fraud on the plaintiffs."

We turn now to the jury's award of *punitive damages* against Ford Motor Company and Ford Motor Credit Company in the total amount of $4,000,000 which the Third Circuit "vacate[d] . . . in its entirety" (A-64)(*i.e.*, judgment n.o.v.) even though, according to the Panel's Opinion (A-58): "Ford Motor and Ford Credit assert that the punitive damages award of $4 million is unwarranted *and seek relief in the form of a new trial or remittitur*" [Emphasis added.]

First, the Panel stated: "Because we will reverse the judgment against Ford Credit on both the fraud *and antitrust [sic!]* counts, we will set aside that $1.2 million portion of the punitive damages award attributed to Ford Credit" (A-58). [Emphasis added.]

Noting correctly that "the legal and factual prerequisite for an award of punitive damages is *outrageous conduct*" (A-59), the Panel then improperly substituted its own opinion and judgment for the jury's judgment and verdict and stated *erroneously:* "The evidence in this case clearly did not meet that level of outrageous or malicious conduct required to sustain an award of punitive damages" (A-61). "Lacking the basis of outrageous conduct, an award of punitive damages cannot stand. We will vacate the award of $2.8 million in punitive damages against Ford Motor" (A-63).

Contrary to the Panel's statement that "plaintiffs assert that the jury's verdict of liability on the fraud count sufficiently establishes outrageous conduct for punitive damages" (A-60), we never said that even though it is true that Pennsylvania's leading case of *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, at 130, 464 A.2d 1243, at 1263 (1983) stated that "it is difficult to picture a fact pattern which would support a finding of intentional fraud without providing proof of 'outrageous conduct' to support an award of punitive damages. We note that other jurisdictions,

while agreeing with the above standard [punitive damages based upon "outrageous conduct" as stated in §908 of Restatement (Second) of Torts], have found that fraudulent misrepresentation by itself is sufficient to uphold an award of punitive damages because of the state of mind rendering it fraudulent."

The respondents have admitted in a Brief filed by them with the Third Circuit[7] that *the District Court's "instructions to the jury regarding punitive damages [were] consistent with current Pennsylvania law".*

Chief Judge Bechtle's instructions to the jury in this case on *punitive damages* are certainly very clear and very correct. See App. 3741-2, 3759-62.[8]

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7. "The Court's instructions to the jury regarding punitive damages, while consistent with current Pennsylvania law, provided inadequate guidance for the jury." *Brief of Appellants Ford Motor Company and Wenner Ford Tractor, Inc.*, dated February 19, 1991, page 49, note 23.

8. Following closing arguments on damages, Judge Bechtle instructed the jury in part (App. 3741-2)[Emphasis added]:

"Question No. 5 is in respect to punitive damages. Up to this point, members of the jury, I have been referring to compensatory damages . . . You have already determined that the defendants, Ford Motor Credit Company and Ford Motor Company, engaged in fraudulent conduct. You are now permitted, *although you are not required*, you are permitted, to decide whether, in addition to compensatory damages, there should be what we call punitive damages awarded in favor of the plaintiffs by either or both of these companies. You should consider them separately in this regard.

Unlike compensatory damages, punitive damages are intended to *punish and deter* that sort of conduct.

Merely because there was fraud doesn't automatically mean that the plaintiffs are entitled to punitive damages. In addition to that, the plaintiffs must have demonstrated to you that the conduct was *outrageous*, that is, conduct that could be said to either rise out of behavior that was *either willful, or malicious, or reckless or oppressive.* And if you conclude that the conduct was of that category, you have the discretion to determine the extent to which punitive damages should be awarded.

In deciding that, you can consider a number of facts. You can consider, first of all, the character of the defendants' conduct, what it was, what happened. You should consider the nature and extent

"It is well settled law in Pennsylvania that the decision of *whether to award punitive damages* and the *amount* to be awarded *are within the discretion of the fact finder." Delahanty* v. *First Pennsylvania Bank,*

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of harm to the plaintiffs. That is, consider what you believe under the evidence was the consequence of this.

You can consider the wealth of the defendant.

You can consider any other factor that you believe assists you in determining whether or not punitive damages should be awarded as either punishment and/or as a deterrence to like conduct of others in the future.

In regard to punitive damages, you should consider each defendant separately. First you decide if punitive damages should be awarded at all, and then to what extent, under the standard I mentioned."

When the jury requested further instructions on punitive damages, Judge Bechtle instructed again at length [App. 3759-62] when court reconvened the next trial day. He instructed in part: "[T]he first notion to keep in mind is that punitive damages are *different* from compensatory damages . . . Punitive damages may be awarded by a jury when the act or conduct is done with *reckless indifference or bad intent or motive*. But keep in mind, *the mere fact that someone has committed fraud doesn't automatically mean they are entitled to punitive damages*. You first have to decide if what happened here is what has been referred to by ***both counsel***, who suggested to the jury, and the cases support it, as well, whether the conduct was ***outrageous — outrageous***. *It could be fraudulent and not be outrageous*, but it could be fraudulent *and in addition* be outrageous . . . You should determine whether the evidence has been offered to you that ***the conduct was willful, malicious, wanton, reckless, or oppressive***. . . [Y]ou should consider the character of the conduct and the defendants who acted in that way . . . the nature and extent of the harm to the . . . plaintiffs . . . what resulted from this; the wealth of the defendant insofar as it is relevant in fixing an amount which will punish the defendant and deter the defendant or others from like conduct in the future . . .

The award of punitive damages must come from a reasoned, fair assessment of those factors, free of bias or prejudice or passion.

So, punitive damages, unlike compensatory damages . . . is to set a sum that the jury believes may be appropriate under the circumstances in a particular case in order to punish a defendant's *outrageous conduct* and to deter the defendant and others from the commission of like acts or conduct". [Emphasis added.]

N. A., 318 Pa. Super. 90, 129, 464 A. 2d 1243, 1263 (1983). Pennsylvania has adopted the rule for punitive damages set forth in §908 of Restatement (Second) of Torts and the comments thereunder. *Ibid.* Section 908 provides in part that "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's *evil motive* or his *reckless indifference to the rights of others.*" The law in Pennsylvania is that punitive damages need *not* be reasonably related to compensatory damages, and there is no requirement of proportionality. *Kirkbride* v. *Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A. 2d 800, 802-3 (1989). Where liability is determined in a cause of action, it is not necessary for specific compensatory damages to be awarded to sustain a punitive damage award. Punitive damages can be predicated upon the finding of liability. *Ibid.* Therefore, even if the Third Circuit's decision to grant a new trial on compensatory damages is sustained, the jury's award of punitive damages must stand.

The jury was certainly justified in concluding that Ford and Ford Credit, through their employees and/or agents, acted with "evil motive" or with "reckless indifference" to plaintiffs' rights when they defrauded plaintiffs. The jury properly found this to be "outrageous conduct" on the part of the defendants.[9]

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9. "Outrageous conduct," "evil motive" and "reckless indifference" are concepts that a jury could understand and determine as well as an appellate court. As this Court stated in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032, 1044 (1991), the discretion given to a jury there in determining punitive damages was "no greater than that pursued in many familiar areas of the law as, for example, deciding 'the best interests of the child,' or 'reasonable care,' or 'due diligence,' or appropriate compensation for pain and suffering or mental anguish."

In erroneously concluding that "the evidence in this case clearly did not meet that level of outrageous or malicious conduct required to sustain an award of punitive damages" [Opinion, A-61], the Third Circuit first hauls up the red herring of a discussion Fraher and other Ford employees had in August 1981 long after Ford terminated Tunis Brothers' tractor franchise in April 1981 by

III. In conflict with *Brown Shoe Co.*, the Third Circuit improperly reversed the District Court and directed judgment n.o.v. on the verdict for petitioners' antitrust claims, disagreeing with the jury's finding that respondents' conspiracy substantially harmed competition in relevant, well-defined product and geographic "*submarkets*" in violation of antitrust laws.

By reversing and directing the District Court "to grant judgment n.o.v. in favor of all the defendants on the antitrust claims" (A-30; pages 7-8 *supra*), the Third Circuit not only erred in substituting its judgment for the jury's findings of fact on the relevant product and

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"accepting" the unconditional resignation of Tunis Brothers so fraudulently and unconscionably secured by Nickel and Fraher in March 1981. How could the Third Circuit think that this discussion would excuse Ford's "outrageous conduct" six months earlier?

And it was sheer sophistry for the Third Circuit to state at A-62 that Ford's fraudulent misrepresentation did not "constitute the requisite outrageous conduct for punitive damages" simply because Ford could have terminated Tunis Brothers' franchise upon 60 days notice ("which would not have constituted outrageous conduct") but instead "chose to fraudulently induce Tunis' resignation". By analogy, when a man can legally divorce his wife but elects instead to murder her, this is not "outrageous conduct".

The Panel claimed in note 13 of its Opinion (A-58) that it was troubled by certain remarks of petitioners' counsel during his rebuttal argument on damages. The very experienced trial judge was not troubled by what the Panel quoted out of context and which followed the highly inflamatory closing argument of respondents' counsel who accused petitioners (*i.e.*, their counsel) of putting their expert on the witness stand "in a calculated effort to deceive you, to bamboozle you . . . to change sworn testimony" and "to manipulate . . . you" (App. 4913-14; 3707-8). In his rebuttal, petitioners' counsel was only asking for punitive (not compensatory) damages, a way to punish Ford, not to "compensate" petitioners. He concluded: "Make those punitive damages very, very large. Make Ford . . . hurt. Give us as much as you possibly can [in] compensatory damages, but in the matter of fraud, you can make it hurt" (App. 3717). If any curative instruction was necessary, Judge Bechtle's very clear instructions on punitive damages, which the jury heard twice on different days, took care of that. In any event, counsel's rebuttal cannot justify the Panel's order on punitive damages.

geographic markets, but its decision was in conflict with *Brown Shoe Co., Inc. v. United States,* 370 U.S. 294, 325, 336-337 (1962) which held that well-defined product and geographic *submarkets* may exist within a broad market. See also *Columbia Metal Culvert Company v. Kaiser Aluminum & Chemical Corporation,* 579 F.2d 20 (3d Cir. 1978), *cert. denied,* 439 U.S. 876 (1978). As the Panel stated (A-14): "The question of relevant market definition is a factual one and 'we . . . must affirm the jury's conclusion unless the record is devoid of evidence upon which the jury might reasonably base its conclusions.' " *Weiss v. York Hospital,* 745 F.2d 786, 825 (3d Cir. 1984). For the factual and legal reasons stated by the District Court in its excellent analysis of the relevant market (A-83 to A-87), the District Court should be affirmed and the Court of Appeals should be reversed on petitioners' antitrust claim.

CONCLUSION

For the special and important reasons stated herein, petitioners respectfully submit that the Court should grant this petition for a writ of certiorari so that the Court may consider the questions presented, correct the errors of the court below in the interest of justice, and help safeguard the constitutional guarantee of trial by jury against judicial erosion through interference with the proper function of the jury.

Respectfully submitted,

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May 11, 1992